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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERVANDO ARELLANO, Defendant and Appellant.	B170571 (Los Angeles County Super. Ct. No. BA232599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Modified and, as modified, affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller, and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Servando Arellano, appeals from the judgment entered following his conviction, by jury trial, for special circumstances murder (lying in wait), premeditated attempted murder, making criminal threats (5 counts), disobeying a restraining order (4 counts), and stalking, with firearm use enhancement findings (Pen. Code, §§ 187/190.2, subd. (a)(15), 664/187, 422, 273.6, 646.9, 12022.5, 12022.53).[1] Sentenced to state prison for life without possibility of parole, plus 49 years and 8 months to life, he contends there was trial and sentencing error.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Angelica Arellano married defendant Servando Arellano in 1997, when she was 17 years old. After having a son, they separated sometime around September 2001. Angelica ultimately went to live at her parents' house, on 81st Street, just before the Arellanos's second son was born. Angelica lived with her parents until she was murdered on June 8, 2002.

Arellano's sister, Julissa, saw him assault Angelica several times. She once saw Arellano hit Angelica during an argument at a time when Angelica was pregnant. Arellano once hit Julissa in the face when she tried to prevent Arellano from striking Angelica. On another occasion, Angelica telephoned Julissa, said she and Arellano were fighting, and asked Julissa to take her to Julissa's house in Pasadena. Julissa did so. When Arellano telephoned to ask where Angelica was, Julissa lied and said she didn't know. But Arellano came over later that night and, when he discovered Julissa had lied, he pointed a gun at her and said, " 'I should shoot you right now.' " Angelica managed to calm him down.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Angelica got a restraining order against Arellano in December 2001, but he continued to make threatening telephone calls. On April 4, 2002, police responding to Angelica's house found Arellano on the property in violation of the restraining order. On May 8, 2002, Angelica told police Arellano had accosted her in the parking lot of Southwest College, where she was a student, and said, "Just wait until you're alone. I am not afraid to go to jail."

Between May 13 and May 24, 2002, Arellano left a series of threatening messages on Angelica's phone machine. He said he was going to get a gun and kill her. Among his threatening statements were the following: "I am going to catch you slipping when your [*sic*] not with the kids. . . . I'll catch you slipping, I'll catch you slipping when you by yourself, I am not stupid." "I am right here by the 99 Cents Store. I'll wait for you in the mornings. I'll catch you in the morning, I'll catch you later on tomorrow or some other day." "So I am waiting for you tomorrow after you drop off Ernesto [their son] for school. I will just wait for you whenever I catch you." "Next time I see you I am going to smoke your ass man." "[L]ike I said, you are going to make me payments." "[F]our people you really love in this world. They're going down."

Sometime between May 31 and June 1, 2002, Angelica's car was vandalized, and she believed Arellano had done it.

When Angelica started working at a Staples store in February 2002, she told the manager, Karen Rutherford, about the restraining order and her domestic situation. Arellano sometimes showed up at the store looking for Angelica and, in late May, he was verbally abusive when Rutherford told him Angelica would not be working that day. On May 28, Angelica got upset when Arellano called her at the store, so Rutherford said she would take Arellano's calls. When he called back and asked to speak to Angelica, Rutherford said she was unavailable. Arellano reacted by threatening to kill Rutherford and all her employees. Rutherford testified Arellano "said if I don't start cooperating with him he is going to come down and shoot me and everybody else." Rutherford was scared and called the police.

On June 7, 2002, Angelica and her sister Daisy went to the movies. Angelica gave Daisy her cell phone, which Daisy wore on her left hip. While they were waiting for the movie to start, Arellano left messages on Angelica's cell phone. Angelica and Daisy listened to one message in which Arellano complained about not being able to see his children and about Angelica going out with other men. Arellano said, "Just wait until I get my turn though," and "Your time is coming though man. Your time is coming." Arellano had called Angelica's house earlier that night and asked to speak to his son. When Angelica's mother refused, Arellano responded by saying "he was going to kill [Angelica]."

The movie ended about 11:30 p.m. Angelica and Daisy arrived home shortly after midnight. Daisy testified she did not see anyone on the street when Angelica turned onto 81st Street, entered the driveway and parked. They talked for a few minutes. Daisy did not see anyone in the driveway area during that time. Just as she and Angelica were opening the car doors, Daisy heard three loud noises. She shut her eyes. When she opened them, she saw that the cell phone on her hip had exploded and that Angelica's face was covered with blood. Angelica had sustained three gunshot wounds, two of which, one to the face and one to the chest, were fatal.

Francisco Perez, who lived across the street from Angelica's house, had been sitting by his front window that night. He initially saw Arellano walking back and forth about 20 minutes before Angelica and Daisy returned from the movie. Perez saw Angelica drive up. He saw Arellano approach the car, go up to the driver's side door and start shooting. Arellano then fled on foot.

Pedro Rodriguez had once worked at a restaurant with Arellano. The day after Angelica was murdered, Arellano called and asked for a place to stay. Although Rodriguez refused, Arellano showed up saying he had no place to go. Rodriguez put him up for one night and then checked him into a motel. Rodriguez later discovered that a bag Arellano left behind had a gun in it, and he notified the police. After his arrest, Arellano called Rodriguez from jail several times and insisted that Rodriguez visit him. When Rodriguez refused, Arellano indicated he wanted to use Rodriguez as an alibi.

Rodriguez testified Arellano said if Rodriguez refused to cooperate, "his homies was going to smoke me."

2. *Defense evidence.*

A housekeeper who worked at the former Days Inn in Long Beach recognized Arellano as someone she had seen at the hotel several times. In 2002,she saw him with a woman and a little child. Estela Mendoza also worked at the Days Inn in Long Beach. She had seen Arellano two or three times in 2002. She did not recall ever seeing Arellano with a woman.

CONTENTIONS

1. The lying-in-wait special-circumstance statute is unconstitutional.

2. There was insufficient evidence to support the lying-in-wait special circumstance finding.

3. There was insufficient evidence to support the verdict of premeditated attempted murder.

4. Imposition of consecutive sentences on counts 6, 10 and 11 violated section 654.

5. Imposition of a firearm use enhancement under section 12022.53 was improper.

6. An incorrect sentence was imposed for the premeditated attempted murder conviction.

7. A parole revocation fine was improperly imposed.

8. An aggravated term was imposed in violation of the *Apprendi/Blakely* rule.

DISCUSSION

1. *Lying-in-wait special-circumstance statute is constitutional.*

Arellano contends his life-without-possibility-of-parole sentence must be vacated because the lying-in-wait special-circumstance statute (§ 190.2, subd. (a)(15)) is unconstitutional. This claim is meritless.

Arellano lacks standing to raise this issue. "The Eighth Amendment requires that state sentencing guidelines clearly distinguish between criminals sentenced to death and

those not sentenced to death. *Godfrey v. Georgia*, 446 U.S. 420, 428 . . . 64 L.Ed.2d 398 (1980). However, the Supreme Court has refused to extend this rule to require states to distinguish between criminals sentenced to LWOP and those sentenced to LWP. [Citation.]" (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906, (*Houston*).)

The defendant in *Houston*, convicted of first degree murder for hiding outside his wife's office with a shotgun and shooting her when she left the building, argued "the California Penal Code violates the Eighth Amendment by establishing vague and arbitrary guidelines for determining when the death penalty may be imposed. Houston specifically argues that the line between non-capital first degree murder by means of lying in wait and capital first degree murder with the special circumstance of lying in wait has become blurred and makes imposition of the death penalty vague and arbitrary." (*Id.* at pp. 906-907.)

The Ninth Circuit held the defendant "lack[ed] standing to bring this argument because he was not sentenced to death." (*Houston,* at p. 907; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 995, 996 ["We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is 'appropriate' -- whether or not the sentence is 'grossly disproportionate.' [Citations.] Petitioner asks us to extend this so-called 'individualized capital-sentencing doctrine,' [citation], to an 'individualized mandatory life in prison without parole sentencing doctrine.' We refuse to do so." "We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.").][2]

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2 Arellano asserts he has standing to make this constitutional challenge because "[t]he construction of the special circumstance statute in this case must be consistent with its construction in a capital case." But the case law he relies on is inapposite. *People v. Estrada* (1995) 11 Cal.4th 568, concerned the adequacy of a jury instruction on the "reckless indifference to human life" aspect of a felony-murder special-circumstance allegation against a non-killer accomplice. Because this language came from *Tison v. Arizona* (1987) 481 U.S. 137, *Estrada* said: "We therefore begin our inquiry into whether the import of section 190.2(d) is adequately conveyed by its express statutory terms by looking to *Tison* for the meaning of the statutory phrase 'reckless indifference to

Arellano's claim also fails on the merits. He argues the lying-in-wait special circumstance is unconstitutional because it fails to provide any meaningful basis for distinguishing it from lying-in-wait first degree murder.[3] This "duplication of elements" argument has generally been rejected based on *Lowenfield v. Phelps* (1988) 484 U.S. 231, which reasoned: "[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. [Citation.] . . . [¶] Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.' The fact that the sentencing jury is also required to find the existence of an aggravating

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human life.' " (*People v. Estrada, supra,* 11 Cal.4th at p. 576.) *Owen v. Superior Court* (1979) 88 Cal.App.3d 757, the other case Arellano relies on, involved a pretrial challenge to an indictment which contained special circumstance allegations even though nobody had been killed.

[3] According to CALJIC No. 8.25 (6th ed. 1996): "Murder which is immediately preceded by lying in wait is murder of the first degree. [¶] The term 'lying in wait' is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence]. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." According to CALJIC No. 8.81.15.1 (July 2004 ed.): "To find that the special circumstance referred to in these instructions as murder by means of lying in wait is true, each of the following facts must be proved: [¶] 1. The defendant intentionally killed the victim; and [¶] 2. The murder was committed by means of lying in wait. [¶] Murder which is immediately preceded by lying wait is a murder committed by means of lying in wait. [¶] The term 'lying in wait' is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence]. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." (*Id.* at p. 246; see *People v. Sapp* (2003) 31 Cal.4th 240, 286 ["Defendant contends the multiple murder and financial gain special circumstances in California's 1978 death penalty law violate the federal Constitution's Eighth Amendment in that they fail to 'genuinely narrow the class of persons eligible for the death penalty' (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, . . .). We have previously rejected similar claims with respect to the special circumstances collectively, concluding that 'California's scheme for death eligibility satisfies the constitutional requirement that it "not apply to every defendant convicted of a murder . . . ." ' "]; see also *People v. Webster* (1991) 54 Cal.3d 411, 456 [" 'Triple-counting' the same facts (murder in the commission of robbery) as first degree murder, a death-qualifying special circumstance, and an aggravating factor at the penalty phase, [does not violate] guaranties against cruel and unusual punishment, double jeopardy, and multiple punishment."].)

In any event, even if the duplicate elements argument were valid, Arellano's claim would still fail because there does exist a meaningful distinction between lying-in-wait first degree murder and the lying-in-wait special circumstance.

The adoption of Proposition 18 in 2000 "changed the word 'while' in the lying-in-wait special circumstance to 'by means of' so that it would conform with the lying-in-wait language defining first degree murder to essentially eliminate the immediacy requirement that case law had placed on the special circumstance." (*People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 307.)

Arellano argues that, after Proposition 18, the two statutes "now incorporate the identical definition of lying in wait." Not so. It is well-recognized that lying in wait as a special circumstance requires an intentional killing, whereas lying in wait as a basis for first degree murder does not. (See *People* v. *Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149 [lying-in-wait murder " 'requires only a wanton and reckless intent to inflict injury likely to cause death,' " while lying-in-wait special circumstance requires " 'an

intentional murder' "]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [lying-in-wait special circumstance "requires that the murder be intentional, thus eliminating murders where only implied malice has been established"]; *People v. Superior Court (Bradway), supra,* 105 Cal.App.4th at p. 309 ["even after Proposition 18 changed the language of the lying-in-wait special circumstance to comport with the language of first degree murder 'by means of' lying in wait, the special circumstance remains distinguishable because it still requires the specific intent to kill, whereas first degree murder by lying in wait does not"].)

Arellano argues these cases were wrongly decided, citing the dissenting opinion in *People v. Superior Court (Bradway), supra,* 105 Cal.App.4th 297, which said: "Although superficially it appears that the distinction between lying-in-wait murder, which purportedly requires express or implied malice, and the lying-in-wait special circumstance, which requires express malice, is a meaningful distinction, on closer examination it is my view that because the definition of lying in wait is identical for both, there is no distinction. . . . [T]o establish either lying-in-wait murder or the lying-in-wait special circumstance, the defendant must be proved to have acted with premeditation and deliberation. . . . If by definition lying in wait as a theory of murder is the equivalent of an intent to kill, and lying in wait is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires only implied malice appears incorrect because the concept of lying in wait is the functional equivalent of the intent to kill." (*Id.* at p. 313, dis. opn. McDonald, Acting P. J.)

But lying in wait is *not* the functional equivalent of an intent to kill. "[O]ne can commit murder even when he or she has no intent to kill or injure. For example, if one simply wishes to scare another by shooting a gun in the direction of the other person intending the bullet to just miss that person (i.e., without the intent to kill or injure), the shooter can be guilty of murder if, accidentally, the bullet strikes and kills the person or a nearby innocent bystander. [¶] Ordinarily, this type of killing would be murder of the second degree. However, if this murder is perpetrated by means of lying in wait, it is, by

statutory definition, murder of the first degree." (*People v. Laws* (1993) 12 Cal.App.4th 786, 794.)

Thus, even after the special circumstance language was amended by Proposition 18, there is still a meaningful difference between lying-in-wait murder and the lying-in-wait special circumstance.

2. *Sufficient evidence of lying-in-wait special circumstance.*

Arellano contends there was insufficient evidence to sustain the lying-in-wait special circumstance finding. This claim is meritless.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

One element of the lying-in-wait special circumstance is that the victim be taken by surprise, even if the victim is aware of the murderer's presence. Arellano argues

Angelica could not have been taken by surprise because "he had forewarned her for months on end that he was going to 'smoke her' and that he would go anywhere to accomplish his mission. The telephone calls and harassment were non-stop. He even called her that night on the cell phone [and] complained about her mother not allowing him access to their children and how she was going to get 'hers.' " Arellano argues he "was hell bent on killing Angelica and she knew it."

The Attorney General replies: "[F]ollowing appellant's analysis, anyone who has made any prior threats to a potential victim would not be accountable for murder by means of lying in wait and would insulate himself. This could not be the state of the law. Clearly, the focus is on the element of surprise and the defendant's conduct and intent at the time of the incident."

We agree. While a victim of domestic violence and continuing death threats might well suspect she will be attacked sometime in the future, she has no way of knowing exactly when or where that attack will occur. The very fact Arellano *repeatedly* told Angelica her death was imminent tended to dilute the effect of those warnings. Indeed, Daisy testified Angelica pointedly refused to curtail such activities as going to the movies in the face of Arellano's continual death threats. We conclude Arellano's death threats did not negate the surprise element of lying in wait.[4]

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[4] "[I]n domestic violence cases, decisions to kill are often made quickly and often there are long-standing emotional issues involved. In such situations, murders are not always planned long in advance and executed pursuant to a preexisting plan. Nevertheless, where a defendant makes a decision to kill, conceals his purpose, watches and waits, and takes the victim by surprise, the murder was accomplished by means of lying in wait." (*People v. Superior Court (Lujan)* (1999) 73 Cal.App.4th 1123, 1128; see also *U.S. v. Downs* (8th Cir. 1995) 56 F.3d 973, 977 [rejecting defendant's argument his history of domestic violence toward murder victim precluded any inference of premeditation from fact he brought guns to the murder scene: "Essentially, Downs argues that because he made violent threats against [the victim] with guns in the past, the district court can only infer from the evidence an intention to make further violent threats. We reject this contention as meritless. Among other things, such a rule would shield all habitual batterers and abusers from prosecution for first-degree murder. However common, repeated acts of domestic violence cannot inoculate a defendant against the inference that the careful preparation of firearms signaled an intent to commit murder."].)

Another element of the lying-in-wait special circumstance is that the murderer act by means of concealment. Arellano argues there was insufficient evidence of concealment because he was seen on the street shortly before the murder by Angelica's neighbors. However, "physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder. (*People v. Sutic* (1953) 41 Cal.2d 483, 492 . . . [concealment in ambush unnecessary]; *People v. Tuthill* (1947) 31 Cal.2d 92, 100-101 . . . [victim aware of defendant's physical presence prior to attack]; *People v. Byrd* (1954) 42 Cal.2d 200, 208-209 . . . [defendant waited for four hours in front of his former wife's home, entered it, conversed with her, and shot her]; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 407 . . . [concealment of defendant's purpose is sufficient] . . . . [¶] . . . [¶] 'The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct.' " (*People v. Morales* (1989) 48 Cal.3d 527, 554-555.)

The evidence demonstrated Arellano was watching and waiting for Angelica to return home, that he was lurking close to her house and, after she drove up, that he approached and started shooting while Angelica was still sitting in the car. Arellano's phone message at 9:30 p.m. the night of the murder contains apparent references to the birthday party being held for his sister's child at Angelica's house that day, and to the fact Angelica went out with Daisy, leaving the children with her mother.[5]

These comments raised the inference Arellano had been watching the house that day. Perez's testimony shows Arellano was lurking around Angelica's house 20 minutes before Angelica and Daisy returned from the movie, and that after the car pulled up he approached and shot Angelica before she got out. Daisy testified she did not see anyone in front of the house as the car drove up the street; nor did she see anyone walk up to the

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5 In his phone message Arellano said, "So you are over there getting our party on right. That's all right, that's all good," and "So get your fun whatever, leave my fucking kids at your moms [*sic*] house while you go getting your party on."

car as it sat in the driveway. Daisy was unaware there was any danger until she heard the gunshots. There was sufficient evidence of concealment.

3. *Sufficient evidence of attempted premeditated murder*.

Arellano contends there was insufficient evidence to support his conviction for the premeditated attempted murder of Daisy. This claim is meritless.

"Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 . . . , 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

Arellano asserts none of the *Anderson* factors was present. He argues "there is absolutely no evidence remotely suggesting that he planned to kill Daisy. All of his anger and rage was directed toward Angelica." "Nor was there any evidence at the time of the shooting suggesting that anyone but Angelica was on his mind. 'Angelica' was always the focus and motive for his obsessive compulsive behaviors." Arellano asserts the only reasonable inference from all the evidence is that Daisy was accidentally shot by a bullet intended for Angelica, arguing "it is reasonable to assume that if [he] were determined to kill Daisy as well as Angelica, he would have fired more than he did before fleeing the scene."

We are not persuaded. Arellano went to Angelica's house with a loaded gun and shot two people at close range. This alone tends to show premeditation and deliberation. (See *People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, ["that defendant brought his loaded gun (to the location) and shortly thereafter used it to kill an unarmed victim reasonably suggests that

defendant considered the possibility of murder in advance"]; *People v. Alcala* (1984) 36 Cal.3d 604, 626, overruled on other grounds by *People v. Falsetta* (1999) 21 Cal.4th 903, 911, ["when one . . . brings along a deadly weapon which he subsequently employs, it is reasonable to infer that he considered the possibility of homicide from the outset"].) That Arellano could have fired more shots at Daisy does not establish a less culpable state of mind. "There is nothing inherently illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent to kill. The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

Moreover, there was other evidence in the record tending to show Arellano shot Daisy with premeditation and deliberation. At various times while making his telephone threats to Angelica, Arellano talked about killing other people as well. In one message, he threatened to kill any new lover she might have or, arguably, anyone with her when he decided to strike: "[L]ike I said, remember the vow, remember the vows, until death do us part. . . . I am taking my vows serious[ly]. If I catch you with somebody whatever he's coming down with you to [*sic*]. *Whoever is with you . . . when that day comes . . . .*" (Italics added.) Arellano referred to "four people you really love in this world," and said, "They're going down."

In another message he said: "This weekend is gonna make me famous. I am going to check your movements. I've got four people on my list now. All you guys going to be game over." Daisy, who was Angelica's sister, could reasonably have been viewed by the jury as someone Arellano intended to target as a way of avenging himself against Angelica. The phone message Arellano left on the night of the shooting suggested he had been watching Angelica's house that night and knew she had gone out with Daisy.

But even if the jury did not conclude Arellano knew Daisy was going to be in the car, there was ample evidence showing he quickly decided to kill her once he became aware of her presence. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 767 [process of

premeditation and deliberation does not require any particular extended period of time: " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' "].)

The evidence shows Arellano was fairly promiscuous in handing out death threats. He threatened to kill people he believed were shielding Angelica, such as Rutherford and the other people who worked at the Staples store. He threatened to kill his sister Julissa when he discovered she had lied in order to protect Angelica from him. He threatened to kill Rodriguez for not going along with an attempt to engineer a false alibi. Thus, even if the jury did not conclude Daisy was on the list of four, it could have reasonably concluded Arellano decided to kill her once he realized she had been out with Angelica. The prosecutor urged precisely this theory on the jury at closing argument.

4. *Improper premeditated attempted murder sentence must be corrected.*

Arellano contends the trial court erred by imposing a sentence of 15 years to life on count 2, his conviction for the premeditated attempted murder of Daisy. The People, acknowledging the correct sentence for this offense is life with the possibility of parole, properly concede the error. (See § 664, subd. (a).) We will order the judgment modified accordingly.

5. *Firearm use enhancement properly imposed*.

Arellano contends the trial court erred by imposing, in connection with his count 1 conviction for lying-in-wait murder, a 25-years-to-life enhancement under section 12022.53, subdivision (d), for personally discharging a firearm causing death. He argues this enhancement violated the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522, section 654's prohibition of multiple punishment, and the language of section 12022.53, subdivision (j). This claim is meritless.

a. *Enhancement not barred by merger doctrine*.

Under the "merger doctrine," a felony which is an integral part of a homicide, such as an assault, may not serve as the basis for a felony-murder conviction, because "[t]o allow such use of the felony-murder rule would effectively preclude the jury from

considering the issue of malice aforethought[.]" (*People v. Ireland, supra*, 70 Cal.2d at p. 539.) However, this doctrine has only been applied in the context of felony murder and assault. (See *People v. Sanders* (1990) 51 Cal.3d 471, 509 [error to instruct jury it could convict defendant of first degree murder if it found killing occurred during burglary where defendant's intent was to commit assault]; *People v. Garrison* (1989) 47 Cal.3d 746, 778 [burglary committed to gain entry for murder cannot support felony-murder conviction under *Ireland*].)

Moreover, "there is no authority extending the merger doctrine to enhancements. The California Supreme Court has ruled that the merger doctrine applies to 'certain inherently dangerous felonies,' and permits them to be used 'as the predicate felony supporting application of the felony-murder rule' only when this 'will not elevate all felonious assaults to murder or otherwise subvert the legislative intent.' ([*People v. Hansen* (1994) 9 Cal.4th 300, 315] . . . .) A sentence enhancement does not fit within this delineation of the merger doctrine." (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374.)[6]

Arellano's argument violates both of these strictures.

b. *Enhancement not barred by section 654.*

The question whether section 654 applies to enhancements generally has not been conclusively determined by the California Supreme Court and there is a split of opinion among the Courts of Appeal. (See *People v. Coronado* (1995) 12 Cal.4th 145, 157; *People v. Arndt* (1999) 76 Cal.App.4th 387, 394-395.)

In *People v. Myers* (1997) 59 Cal.App.4th 1523, we held section 654 did not bar imposition of "an enhancement . . . imposed [under] Penal Code section 12022.55 for discharging a firearm from a motor vehicle, when the defendant is convicted of murder resulting from discharging the firearm from a motor vehicle." (*Id.* at p. 1530.) We reasoned that "[t]he extinction of [the victim's] life was the crime. The use of the firearm

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6 Arellano argues *Sanders*'s "limited view of *Ireland* is flawed." On the contrary, *Sanders* relied on an analysis of *Hansen* that has just been affirmed in *People v. Robertson* (2004) 34 Cal.4th 156, 170-171.

was merely the method which achieved this crime. Thus, the underlying crime and the enhancement are not identical and there was no double punishment under Penal Code section 654." (*Id.* at pp. 1533-1534.)

This reasoning is equally applicable to section 12022.53 enhancements. In the abstract, murder does not require the prosecution to prove a defendant intentionally and personally discharged a firearm and proximately caused death (§ 12022.53, subd. (d)).

"Clearly, in enacting [section 12022.53] the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties. Nor should section 654 logically apply in such a situation. The manner in which any crime is accomplished may vary in innumerable respects. Thus, '[s]econd degree murder may be committed in a myriad of ways, some that involve use of a firearm, and others, such as stabbing, poisoning, or strangling, that do not involve use of this type of weapon.' [Citation.] Section 654 is not implicated by the imposition of a sentencing enhancement on a particular manner of committing murder -- with the use of a firearm -- adjudged by society through its legislative representatives as particularly egregious and dangerous. What the Legislature has done by enacting section 12022.53 is not to punish the same single criminal act more than once or in more than one way. Instead, in determining that a criminal offender may receive additional punishment for any single crime committed with a firearm, the Legislature has chosen to enhance or expand the punishment imposed on a single underlying crime, where committed by use of a firearm, in order to deter a particular form of violence judged especially threatening to the social fabric." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313-1314, italics in original.)

c. *Enhancement not barred by section 12022.53, subdivision (j).*

Arellano's final argument is that section 12022.53 itself bars imposition of a subdivision (d) enhancement in this case. This claim is meritless.

Arellano argues, "Under the plain language of the statute, the 25 years-to-life enhancement does not apply here because 'another provision of law,' section 190.2, subdivision (a)(3), 'provides for a greater penalty or a longer term of imprisonment,' life without possibility of parole." This same argument was rejected by *People v. Chiu* (2003) 113 Cal.App.4th 1260, on the ground it improperly "equates offenses and enhancements for punishment purposes." (*Id.* at p. 1265.) Moreover, this "argument is trumped by the rules of grammar.

"Defendant focuses on the subdivision (j) language of 'another provision of law' while ignoring the grammatical subject of the subdivision (j) sentence to which that language relates. The entire sentence at issue in subdivision (j) reads: '*When an enhancement specified in this section* has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.' (Italics added.) The subject of this sentence, grammatically speaking, is the 'enhancement specified in this section' -- that is, one of the three applicable enhancements for firearm use or discharge specified in subdivisions (b) through (d). When one of those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The 'greater penalty' part of subdivision (j) ensures that the '[n]otwithstanding any other provision of law' language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishment on a defendant for employing a firearm in committing one of the enumerated crimes." (*People v. Chiu*, *supra*, 113 Cal.App.4th at p. 1264, second and third italics in original.)[7]

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[7] In his reply brief, Arellano states: "Subsequent to the filling of appellant's opening brief [,] Division Two of this Court issued an opinion in *People v. Shabazz* (2004) 118 Cal.App.4th 1458, . . . which essentially adopted appellant's statutory construction of subdivision (j)." However, subsequent to the filing of Arellano's reply

6. *Parole revocation fine properly imposed*.

Arellano contends, and the People concur, that the trial court improperly imposed a $200 parole revocation fine because Arellano was sentenced to life without possibility of parole. But the parties are wrong. A parole revocation fine was proper because Arellano was *also* sentenced to an indeterminate term of 40 years to life, and a determinate term of 9 years, 8 months.

Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

Relying on *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, Arellano argues it was improper to impose a parole revocation fine because, due to the fact one of his sentences was for life without the possibility of parole, he was ineligible for parole. *Oganesyan* held that where one of the terms imposed on a defendant was for life without possibility of parole, the trial court did not err by declining to impose a parole revocation fine "because the sentence does not presently allow for parole and there is no evidence it ever will." (*Id.* at p. 1185.) *Oganesyan* reasoned the legislative purpose of restitution fines is to recoup "from prisoners and potentially from parolees who violate the conditions of their parole some of the costs of providing restitution to crime victims," but given there is only the slimmest chance anything would be recouped from a defendant sentenced to a term that prohibited parole, "there is no evidence the Legislature intended that its cost recoupment purposes were to apply under such an extremely limited set of circumstances." (*People v. Oganesyan, supra,* 70 Cal.App.4th at pp. 1184-1185.)

However, under a plain reading of section 1202.45, this is a case in which the defendant's sentence does include a possible period of parole as to the non-life without

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brief, our Supreme Court granted the Attorney General's petition for review in *Shabazz* and sent the case back to the Court of Appeal for reconsideration in light of *Chiu*.

possibility of parole portion. Although Arellano may never serve a period of parole, it is possible he might. "It bears emphasizing that by the terms of the statute the parole revocation restitution fine comes due only if the defendant's parole is eventually revoked. Until then, the fine is suspended. Thus, the statute contemplates that the conditions for the restitution fine may never materialize." (*People v. Tye* (2000) 83 Cal.App.4th 1398, 1401-1402 [holding trial court properly imposed parole revocation fine after suspending execution of defendant's sentence and ordering probation].) Thus, a parole revocation fine was properly imposed in this case.

7. *Consecutive terms were proper.*

Arellano contends the imposition of consecutive terms on counts 6, 10 and 11, each count a conviction for violating a domestic relations restraining order, violated the multiple punishment prohibition contained in section 654. He argues each offense was based on the same conduct for which he was consecutively sentenced on count 9 (making a criminal threat against Angelica on May 14, 2002) and on count 5 (making a criminal threat against Rutherford on May 28, 2002).

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, italics in original.) " 'The question of whether the acts of which [a defendant] has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.' " (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if there is substantial evidence to support it].)

When it imposed these consecutive sentences, the trial court said, "The court finds that there were separate intents and objectives of all those counts where they could

be argued to have been overlapping because they were disobedience of a court order on some of them, the same dates where they would be criminal threats, and I think there were two different intents to disobey the court order and also to frighten the victim."

With respect to the specific consecutive terms challenged by Arellano, however, there is no need to resort to a 'separate intents and objectives' analysis because each count involved a separate criminal act committed *at a separate time*. A detective testified the tape taken from Angelica's phone machine showed Arellano called three different times on May 14, 2002, and left threatening messages each time. For these three different acts, Arellano was convicted for making a criminal threat in count 9, and violating a protective order in counts 10 and 11.

On May 28, 2002, Arellano called Angelica at the Staples store. After speaking with him, Angelica was "[o]bviously upset" and had "panic in her voice." She immediately informed Rutherford, who agreed to field any further calls from Arellano. The call to Angelica was the basis for the count 6 conviction of violating a protective order. Subsequently, Rutherford spoke to Arellano when he called back, and his conviction on count 5 for making a criminal threat arose out of his threat to kill Rutherford.[8]

Hence, the evidence showed there were five separate acts at issue here, and therefore the factual basis for each conviction was different. Offenses divisible in time may be multiply punished, even if they were all incident to the same objective. (See *People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11 ["It seems clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment."].)

In a supplemental brief, Arellano contends the imposition of consecutive terms on counts 6, 10 and 11 was improper because, under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v. Washington* (2004) 542 U.S. _____, [159 L.Ed.2d 403], the

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8 This division of the May 28 crimes between Angelica and Rutherford is the only one that makes sense because the protective order forbade Arellano from making telephone calls to Angelica, but not to her coworkers.

jury, not the trial court, should have made any factual determinations needed to apply section 654. Not so. The rule of these two cases is "that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. [Citation.] For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts." (*People v. Jones* (2004) 123 Cal.App.4th 62.)

However, this case does not involve imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict. Rather, it involves a trial court's decision not to apply the ban against multiple punishment with regard to three separate crimes. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022 [*Apprendi* does not require jury finding on section 654 question]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270-271 [same].) The *Apprendi/Blakely* rule does not apply to this case.

8. *Imposition of aggravated term was proper.*

Arellano contends the trial court imposed an aggravated sentence on count 3 (criminal threat to Angelica on May 22) in violation of the *Apprendi/Blakely* rule. However, Arellano acknowledges the trial court imposed this aggravated term after finding his conviction record showed "repeated criminal activity of . . . very increasing seriousness."

That a defendant has had prior convictions of increasing seriousness is a factor in aggravation which may be determined by the trial court without violating the *Apprendi/Blakely* rule. (See *People v. Butler* (2004) 122 Cal.App.4th 910, 920-921; *People v. Sample* (2004) 122 Cal.App.4th 206, 224-225.)

DISPOSITION

The judgment is modified to reflect a sentence of life, rather than life without possibility of parole, for the premeditated attempted murder conviction (count 2). As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this change and forward it to the Department of Corrections.

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERVANDO ARELLANO, Defendant and Appellant.	B170571 (Los Angeles County Super. Ct. No. BA232599) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion in the above-entitled matter filed on December 16, 2004, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports and it is so ordered.

The portions of this opinion to be deleted from publication are part 1 of the Discussion on pages 5 through 10, and parts 3 through 8 of the Discussion on pages 13 through 22.

[There is no change in the judgment.]